

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

HOWARD L. DAVIS,)	
)	
Petitioner,)	
)	
v.)	Civil Action No. 01-521-SLR
)	
RICHARD KEARNEY, Warden, and)	
ATTORNEY GENERAL OF THE)	
STATE OF DELAWARE,)	
)	
Respondents.)	

Howard L. Davis, Sussex Correctional Institution, Georgetown,
Delaware. Petitioner, pro se.

Thomas E. Brown, Esquire, Delaware Department of Justice,
Wilmington, Delaware. Counsel for Respondents.

MEMORANDUM OPINION

Dated: September 4, 2002
Wilmington, Delaware

ROBINSON, Chief Judge

I. INTRODUCTION

Petitioner Howard L. Davis is a Delaware inmate in custody at the Sussex Correctional Institution in Georgetown, Delaware. Currently before the court is petitioner's application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. (D.I. 2) For the reasons that follow, the court concludes that petitioner's claims do not provide a basis for granting federal habeas relief. Accordingly, the court will deny the petition.

II. BACKGROUND

On October 12, 1996, petitioner was traveling as a passenger in a car driven by Ollie Blackwell on Route 13 in Kent County, Delaware. A Harrington police officer, Lt. John Horsman, stopped Blackwell for speeding. Blackwell had no driver's license and provided Horsman with a false name, so Horsman arrested her. Because petitioner had no driver's license and appeared intoxicated, Horsman decided to transport him to the police station where he could call someone to pick him up, and to have Blackwell's car towed.

In the meantime, Patrolman Mark Anderson arrived to assist Horsman. Anderson frisked petitioner for weapons before placing him in the squad car, and found none. In the squad car, petitioner threatened Anderson with a stream of obscenities. Anderson recorded petitioner on videotape. When they arrived at the police station, petitioner's unruly behavior escalated,

requiring several officers, including Anderson and Horsman, to restrain him. During the fray, petitioner kicked Horsman in the ribs. Horsman continued performing his duties and did not seek medical attention.

Based on these events, petitioner was charged by information with attempting to assault Anderson, making terroristic threats to Anderson, engaging in disorderly conduct, and assaulting Horsman. Petitioner's jury trial commenced in the Superior Court on June 11, 1997. Over defense counsel's objection, the jury reviewed the recording of the events that occurred in Anderson's squad car.

After approximately three hours of deliberation, the jury informed the court that it could not reach a verdict on any of the counts. The Superior Court, again over defense counsel's objection, instructed the jury to reconsider the evidence and attempt to reach a unanimous verdict.¹ Two and one-half hours later, the jury found petitioner not guilty of attempted assault and terroristic threatening, but guilty of assault in the second degree for kicking Horsman.² On March 6, 1998, the Superior Court sentenced petitioner as a habitual offender to ten years in prison followed by six months probation. On direct appeal, the

¹ The supplemental instruction was given pursuant to Allen v. United States, 164 U.S. 492 (1896).

² The prosecution entered a nolle prosequi on the charge of disorderly conduct.

Delaware Supreme Court affirmed. Davis v. State, No. 119, 1998, 1999 WL 86055 (Del. Jan. 20, 1999).

On September 15, 1999, petitioner filed in the Superior Court a motion for postconviction relief pursuant to Rule 61 of the Superior Court Rules of Criminal Procedure. A Superior Court Commissioner recommended denying the motion based on her finding that each of petitioner's claims was either procedurally barred or without merit. State v. Davis, No. IK96-10-0247-R1 (Del. Super. Ct. June 26, 2000). The Superior Court adopted the Commissioner's recommendation, and denied the motion. State v. Davis, No. IK96-10-0247-R1 (Del. Super. Ct. Sept. 12, 2000). The Delaware Supreme Court affirmed. Davis v. State, No. 476, 2000, 2001 WL 760844 (Del. May 24, 2001).

Petitioner has now filed the current application for federal habeas corpus relief. Respondents ask the court to deny the petition because the claims presented therein either lack merit or are procedurally barred from federal habeas review.

III. GOVERNING LEGAL PRINCIPLES

A. Exhaustion and Procedural Default

Pursuant to the federal habeas statute:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that -

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State

corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2254(b)(1). Grounded on principles of comity, the requirement of exhaustion of state court remedies ensures that state courts have the initial opportunity to review federal constitutional challenges to state convictions. Werts v. Vaughn, 228 F.3d 178, 192 (3d Cir. 2000), cert. denied, 532 U.S. 980 (2001).

To satisfy the exhaustion requirement, "state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999). Although a state prisoner need not "invoke extraordinary remedies" to satisfy exhaustion, he must fairly present each of his claims to the state courts. Id. at 844-45. A claim has not been fairly presented unless it was presented "at all levels of state court adjudication." Cristin v. Brennan, 281 F.3d 404, 410 (3d Cir. 2002).

If a claim has not been fairly presented, and further state court review is procedurally barred, the exhaustion requirement is deemed satisfied because further state court review is unavailable. Lines v. Larkins, 208 F.3d 153, 160 (3d Cir. 2000), cert. denied, 531 U.S. 1082 (2001). Although deemed exhausted, such claims are nonetheless procedurally defaulted. Lines, 208

F.3d at 160. Federal courts may not consider the merits of procedurally defaulted claims unless the petitioner demonstrates cause for the default and prejudice resulting therefrom, or a fundamental miscarriage of justice. Coleman v. Thompson, 501 U.S. 722, 750 (1991); Lines, 208 F.3d at 160.

In order to demonstrate cause for a procedural default, a petitioner must show that "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Murray v. Carrier, 477 U.S. 478, 488 (1986). A petitioner may establish cause, for example, by showing that the factual or legal basis for a claim was not reasonably available or that government officials interfered in a manner that made compliance impracticable. Werts, 228 F.3d at 193. In addition to cause, a petitioner must establish actual prejudice, which requires him to show "not merely that the errors at . . . trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." Murray, 477 U.S. at 494.

Alternatively, a federal court may excuse a procedural default if the petitioner demonstrates that failure to review the claim will result in a fundamental miscarriage of justice. Edwards v. Carpenter, 529 U.S. 446, 451 (2000); Wenger v. Frank, 266 F.3d 218, 224 (3d Cir. 2001). The miscarriage of justice

exception applies only in extraordinary cases “where a constitutional violation has probably resulted in the conviction of one who is actually innocent.” Murray, 477 U.S. at 496. To establish actual innocence, a petitioner must satisfy the “extremely high burden” of showing that it is more likely than not that no reasonable juror would have convicted him. Sweger v. Chesney, 294 F.3d 506, 522-23 (3d Cir. 2002) (citing Schlup v. Delo, 513 U.S. 298, 329 (1995)). “New reliable evidence is almost always required to show actual innocence.” Sweger, 294 F.3d at 523.

B. Standards of Review

The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) mandates the following standards of review:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). A federal court may issue a writ of habeas corpus under § 2254(d)(1) only if it finds that the state court decision on the merits of a claim either (1) was contrary to

clearly established federal law, or (2) involved an unreasonable application of clearly established federal law. Williams v. Taylor, 529 U.S. 362, 412 (2000).

Specifically, a federal court may grant the writ under the "contrary to" clause only "if the state court arrives at a conclusion opposite to that reached by [the United States Supreme Court] on a question of law or if the state court decides a case differently than [the United States Supreme Court] has on a set of materially indistinguishable facts." Williams, 529 U.S. at 412-13. The court "must first identify the applicable Supreme Court precedent and determine whether it resolves the petitioner's claim." Werts, 228 F.3d at 197 (citing Matteo v. Superintendent, SCI Albion, 171 F.3d 877, 888 (3d Cir. 1999)). In order to satisfy the "contrary to" clause, the petitioner must demonstrate "that Supreme Court precedent **requires** the contrary outcome." Matteo, 171 F.3d at 888 (emphasis added).

If the petitioner fails to satisfy the "contrary to" clause, the court must determine whether the state court decision was based on an unreasonable application of Supreme Court precedent. Id. Under the "unreasonable application" clause, the court "may grant the writ if the state court identifies the correct governing legal principle . . . but unreasonably applies that principle to the facts of the prisoner's case." Williams, 529 U.S. at 413. In other words, a federal court should not grant

the petition under this clause “unless the state court decision, evaluated objectively and on the merits, resulted in an outcome that cannot reasonably be justified under existing Supreme Court precedent.” Matteo, 171 F.3d at 890.

Respecting a state court’s determinations of fact, a federal habeas court must presume that they are correct. 28 U.S.C. § 2254(e)(1). The petitioner bears the burden of rebutting the presumption of correctness by clear and convincing evidence. Id. The presumption of correctness applies to both explicit and implicit findings of fact. Campbell v. Vaughn, 209 F.3d 280, 286 (3d Cir. 2000), cert. denied, 531 U.S. 1084 (2001).

IV. DISCUSSION

In his application, petitioner articulates the following claims for relief:

- (1) Anderson filed a false police report stating that he witnessed petitioner kicking Horsman.
- (2) The evidence was insufficient to support a conviction for second degree assault.
- (3) The trial court erred by delivering an Allen charge instead of granting a mistrial.
- (4) Counsel rendered ineffective assistance by failing to advise petitioner that he had waived his right to be charged by indictment rather than information, and by failing to challenge Anderson’s false report.

The court addresses each of petitioner’s claims in turn.

A. Anderson’s Police Report

Petitioner’s first claim is that Anderson filed a false

police report stating that he witnessed petitioner kick Horsman. According to petitioner, Anderson admitted at trial that he did not actually see petitioner kick Horsman. Respondents argue that petitioner never presented this claim to the state courts, and that he is now procedurally barred from doing so. For this reason, they ask the court to find that this claim is procedurally barred from federal habeas review.

A review of the state court records confirms that petitioner did not present his "false police report" claim on direct appeal, nor did he raise it in his motion for postconviction relief. He did, however, address Anderson's false police report in his brief on appeal from the denial of postconviction relief. (D.I. 16, Appellant's Opening Br. in No. 476, 2000) In affirming the Superior Court's order denying postconviction relief, the Delaware Supreme Court did not mention petitioner's claim respecting Anderson's police report.

After reviewing the record in its entirety, this court cannot discern why the Delaware Supreme Court chose not to address petitioner's claim respecting Anderson's police report.³ Nonetheless, this court is certain that the Delaware Supreme

³ To the extent that the Delaware Supreme Court may not have comprehended petitioner's claims, this court empathizes completely. Because petitioner's opening brief lacks organization and clarity, discerning his specific claims is problematic. This court construes liberally petitioner's submissions in an effort to review petitioner's claims to the fullest extent allowed by federal habeas law.

Court would have found this claim procedurally defaulted under Rule 61(i)(3):

Procedural Default. Any ground for relief that was not asserted in the proceedings leading to the judgment of conviction, as required by the rules of this court, is thereafter barred, unless the movant shows

(A) Cause for relief from the procedural default and

(B) Prejudice from violation of the movant's rights.

Super. Ct. R. Crim. P. 61(i)(3). In Delaware, the failure to raise an issue on direct appeal renders a claim procedurally defaulted absent a showing of cause and prejudice. See Bialach v. State, 773 A.2d 383, 386 (Del. 2001). As explained above, petitioner did not challenge Anderson's police report as false on direct appeal. The court thus concludes that petitioner's "false police report" claim is procedurally defaulted under Rule 61(i)(3).

The only remaining question as to this claim is whether petitioner has articulated any reason why his procedural default should be excused. In the current application, petitioner alleges that counsel rendered ineffective assistance by failing to challenge Anderson's police report. "[I]n certain circumstances counsel's ineffectiveness in failing properly to preserve the claim for review in state court" constitutes cause for a procedural default. Edwards, 529 U.S. at 451. An ineffective assistance of counsel claim asserted as cause for the procedural default of another claim is nonetheless subject to the

exhaustion requirement and the procedural default rules. Id. at 453.

Respondents correctly assert that petitioner did not present to the state courts a claim of ineffective assistance based on counsel's failure to present his "false police report" claim on direct appeal. For the reasons set forth more fully below,⁴ the court concludes that this ineffective assistance claim is procedurally barred from federal habeas review. Accordingly, petitioner's claim of ineffective assistance of counsel cannot constitute cause for petitioner's failure to raise his "false police report" claim on direct appeal.

In sum, the court finds that petitioner failed to challenge Anderson's police report on direct appeal. The court cannot excuse this procedural default based on petitioner's procedurally barred claim of ineffective assistance of counsel. For these reasons, the court concludes that petitioner's "false police report" claim is procedurally barred from federal habeas review.

B. Sufficiency of Evidence

Petitioner's next claim is that the evidence adduced at trial was insufficient to support a conviction for assaulting Horsman. The only evidence presented was Horsman's own testimony, which petitioner asserts was insufficient to establish one of the essential elements of second degree assault, i.e.,

⁴ See infra Part IV.D.

that Horsman suffered a physical injury. Respondents correctly acknowledge that petitioner exhausted this claim by presenting it to the Delaware Supreme Court on direct appeal.

Because the Delaware Supreme Court rejected this claim on the merits, this court's review is limited to determining whether that court's decision either was contrary to, or involved an unreasonable application of, clearly established federal law. 28 U.S.C. § 2254(d)(1); Williams, 529 U.S. at 412. The clearly established federal law governing insufficiency of evidence claims is the familiar "rational juror" standard set forth in Jackson v. Virginia, 443 U.S. 307 (1979). Under Jackson, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, **any** rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id. at 319 (emphasis in original).

In Delaware, a person is guilty of assault in the second degree when, inter alia, "the person intentionally causes physical injury to a law-enforcement officer . . . who is acting in the lawful performance of duty." Del. Code Ann. tit. 11, § 612(a)(3). "Physical injury" is defined as "impairment of physical condition or substantial pain." Id., § 222(22). In considering whether the evidence established that Horsman suffered a physical injury, the Delaware Supreme Court wrote:

Horsman testified that Davis's kick knocked the wind out of him and caused 'an immediate sharp pain' under his ribs and

along the rib line. According to Horsman, the area became 'inflamed and it reddened, and by the end of the day it was showing bruising.' Although Horsman did not seek medical treatment, he experienced pain and bruising for approximately one month after the incident and general tenderness for several months. This evidence, if accepted, was sufficient to establish physical injury.

Davis, 1999 WL 868055 at **1.

Although the Delaware Supreme Court did not recite the Jackson standard, this court finds that its decision is not contrary to, nor did it involve an unreasonable application of, Jackson. The Delaware Supreme Court properly reviewed the evidence, and reasonably concluded that it was sufficient to establish a physical injury. This court finds that any rational trier of fact hearing Horsman's testimony could have found that he suffered substantial pain, and thus a physical injury, from petitioner's kick in the ribs.

In short, the court concludes that the Delaware Supreme Court's rejection of this claim is neither contrary to, nor did it involve an unreasonable application of, clearly established federal law. Accordingly, the court will deny petitioner's request for federal habeas relief as to this claim.

C. Allen Charge

Petitioner next alleges that the trial court erred by delivering an Allen charge rather than declaring a mistrial. As described above, after approximately three hours of deliberating, the jury informed the court that it could not reach a verdict on

any of the counts. The court instructed the jury to reconsider the evidence and attempt to reach a unanimous verdict. Two and one-half hours later, the jury returned its verdict. Respondents acknowledge, and correctly so, that petitioner exhausted this claim by presenting it on direct appeal.

The court's review of this claim is again confined to determining whether the Delaware Supreme Court's rejection of this claim was contrary to, or involved an unreasonable application of, clearly established federal law. 28 U.S.C. § 2254(d)(1); Williams, 529 U.S. at 412. Under clearly established federal law, when a trial court receives notice that the jury has reached an impasse, it may deliver a supplemental charge urging the jurors to continue deliberations in an effort to reach a verdict. Allen, 164 U.S. at 501. See Lowenfeld v. Phelps, 484 U.S. 231, 237 (1988) (acknowledging "continuing validity" of Allen). The charge, however, must not "tend[] to coerce undecided jurors into reaching a verdict." Smalls v. Batista, 191 F.3d 272, 278-79 (2d Cir. 1999). Thus, the charge must "admonish the jurors not to surrender their own conscientiously held beliefs." Id. at 279.

In considering whether the Allen charge given in petitioner's case had any "potential coercive effect," the Delaware Supreme Court wrote:

Here, the instruction was given early in the day in response to a note from the jury. It was taken from a pattern

instruction and included the admonition that no juror should yield his or her conscientious conviction as to the weight or meaning of the evidence. Before the Allen charge, the jury had deliberated for about four hours and it deliberated an additional two hours after the charge. The factual issues were not complex. All of these factors support the conclusion that the jury was not coerced into reaching its verdict.

Davis, 1999 WL 86055 at ** 3.

This court has reviewed the transcript of the Allen charge. (D.I. 16, Appendix to Appellant's Opening Br. at A82-A86) Plainly, the trial court encouraged the jurors to "resume your deliberations to see if you can't reach a verdict." (Id. at A86) At least four times, however, the court admonished the jurors not to surrender their own conscientious convictions. (Id. at A84-A86) Like the Delaware Supreme Court, this court cannot find that the Allen charge coerced the jury into reaching a verdict.

For these reasons, the court concludes that the Delaware Supreme Court's rejection of this claim is neither contrary to, nor did it involve an unreasonable application of, clearly established federal law. Accordingly, the court will deny petitioner's request for federal habeas relief as to this claim.

D. Ineffective Assistance of Counsel

Petitioner's final claim is that counsel rendered ineffective assistance by failing to advise petitioner that he had waived his right to be charged by indictment rather than information, and by failing to challenge Anderson's false police report. Respondents argue that these claims are procedurally

barred because petitioner has never presented them to the Delaware Supreme Court. A review of the state court records confirms that petitioner has never presented any ineffective assistance of counsel claim to the Delaware Supreme Court. Because these two claims have traveled slightly different procedural paths, the court addresses them separately.

1. Failing to Advise of Right to Charge By Indictment

Petitioner alleges that counsel failed to advise him of his right to be charged by indictment rather than by information. He raised this claim to the Superior Court in his motion for postconviction relief. The Superior Court concluded that petitioner's conclusory allegations were insufficient to establish prejudice. Davis, No. 9610008845 at 10 (Del. Super. Ct. June 26, 2000). Petitioner did not pursue this claim, or any ineffective assistance of counsel claim, on postconviction appeal.

Because petitioner did not present this claim on postconviction appeal, it is now procedurally barred under Rule 61(i)(4):

Former Adjudication. Any ground for relief that was formerly adjudicated, whether in the proceedings leading to the judgment of conviction, in an appeal, in a postconviction proceeding, or in a federal habeas corpus proceeding, is thereafter barred, unless reconsideration of the claim is warranted in the interest of justice.

Super. Ct. R. Crim. P. 61(i)(4). Reconsideration is warranted in the interest of justice where "subsequent legal developments have

revealed that the trial court lacked the authority to convict or punish the accused.” Cruz v. State, No. 446, 1995, 1996 WL 21060 (Del. Jan. 10, 1996) (quoting Flamer v. State, 585 A.2d 736, 746 (Del. 1990)). In the matter at hand, the record is devoid of any such subsequent legal developments. Further state court review of these claims is clearly foreclosed by Rule 61(i)(4).

2. Failure to Challenge Anderson’s Police Report

Petitioner’s remaining claim of ineffective assistance is based on counsel’s failure to challenge Anderson’s police report as false. As described above, Anderson testified at trial that he did not actually witness petitioner kicking Horsman. This, petitioner asserts, contradicts Anderson’s police report filed at the time of the incident.

Unlike his previously-described claim of ineffective assistance, petitioner did not present this claim to the Superior Court in his motion for postconviction relief. For this reason, this claim is procedurally barred by Rule 61(i)(2):

Repetitive Motion. Any ground for relief that was not asserted in a prior postconviction proceeding, as required by subdivision (b)(2) of this rule, is thereafter barred, unless consideration of the claim is warranted in the interest of justice.

Super. Ct. R. Crim. P. 61(i)(2). In Delaware, a petitioner must present each of his grounds for relief in his initial Rule 61 motion. Super. Ct. R. Crim. P. 61(b)(2); Robinson v. State, 562 A.2d 1184, 1185 (Del. 1989). Delaware courts refuse to consider

any claim that was not asserted in an initial Rule 61 motion unless warranted in the interest of justice. Maxion v. State, 686 A.2d 148, 150 (Del. 1996). In order to satisfy the interest of justice exception, a petitioner must show that "subsequent legal developments have revealed that the trial court lacked the authority to convict or punish" him. Woods v. State, No. 259, 1997, 1997 WL 425492 (Del. July 18, 1997) (citing Flamer, 585 A.2d at 746). Again, the record is devoid of any such subsequent legal developments. Accordingly, the court concludes that Rule 61(i)(2) clearly forecloses state court review of this claim.

3. Reason to Excuse Procedural Defaults

The final step of the analysis is to determine whether the court may excuse petitioner's procedural defaults of his claims of ineffective assistance of counsel. To this end, the court has searched petitioner's submissions in an effort to discern why he failed to pursue his claims in his postconviction proceedings. His submissions are devoid of any such explanation. Likewise, he fails to offer any facts from which the court could conclude that he suffered prejudice as a result of counsel's alleged errors. In addition, petitioner does not suggest that he is actually innocent of second degree assault.

For these reasons, the court concludes that petitioner's claims of ineffective assistance of counsel are procedurally barred. Federal habeas review of these claims is unavailable.

V. CERTIFICATE OF APPEALABILITY

Finally, the court must determine whether a certificate of appealability should issue. See Third Circuit Local Appellate Rule 22.2. The court may issue a certificate of appealability only if petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This requires the petitioner to "demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000).

As explained above, the court has concluded that the claims presented in the current petition do not provide a basis for granting federal habeas relief. The court is persuaded that reasonable jurists would not debate the correctness of its assessments. Petitioner, therefore, has failed to make a substantial showing of the denial of a constitutional right, and a certificate of appealability is not warranted.

VI. CONCLUSION

For the reasons stated, the court will deny petitioner's application for a writ of habeas corpus, and will not issue a certificate of appealability. An appropriate order shall issue.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

HOWARD L. DAVIS,)	
)	
Petitioner,)	
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v.)	Civil Action No. 01-521-SLR
)	
RICHARD KEARNEY, Warden, and)	
ATTORNEY GENERAL OF THE)	
STATE OF DELAWARE,)	
)	
Respondents.)	

O R D E R

At Wilmington, this 4th day of September, 2002, consistent with the memorandum opinion issued this same day;

IT IS HEREBY ORDERED that:

1. Petitioner Howard L. Davis' petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is dismissed, and the relief requested therein is denied.

2. The court declines to issue a certificate of appealability for failure to satisfy the standard set forth in 28 U.S.C. § 2253(c)(2).

Sue L. Robinson
United States District Judge